

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

IN RE:)	Chapter 11 Case
)	Number <u>85-40639</u>
DONALD AUSTIN)	
)	
Debtor)	
_____)	
)	
DONALD AUSTIN)	FILED
)	at 9 O'clock & 36 min. A.M.
Plaintiff)	Date: 6-27-95
)	
vs.)	Adversary Proceeding
)	Number <u>94-04127A</u>
FLEETWOOD INSURANCE AGENCY, INC.)	
)	
Defendant)	

ORDER

This matter comes before the court on the defendant's motion for summary judgment. This adversary proceeding was initiated by the complaint of Chapter 11 Debtor Donald Austin that the foreclosure by Fleetwood Insurance Agency, Inc. ("Fleetwood Insurance") of Mr. Austin's interest in real property was defective, and that the allegedly defective foreclosure advertisement chilled the foreclosure bids. Plaintiff further alleges in the complaint that the deed under power of sale and assumption of possession following the allegedly defective foreclosure constitutes a

violation of the automatic stay of 11 U.S.C. §362, praying for unspecified damages for the alleged stay violation. Plaintiff also seeks this court's declaratory judgment establishing the ownership rights to the property which is the subject of the foreclosure and this adversary proceeding. There being no material facts in dispute, summary judgment should be granted to Fleetwood Insurance with regard to the alleged stay violation and the requested declaratory relief on the grounds of res judicata.

The following facts have been established. On February 13, 1984, Donald Austin borrowed \$50,000.00 from William Fleetwood, giving Mr. Fleetwood as security a deed to secure debt on Mr. Austin's one-half interest in 17.8 acres on Tybee Island, Georgia. The note and deed were subsequently assigned to Fleetwood Insurance, the defendant in this action and movant herein. Mr. Austin filed for protection under Chapter 11 of the Bankruptcy Code in October, 1985. Fleetwood Insurance filed a motion for relief from the stay of 11 U.S.C. §362 in that proceeding. After a hearing, the Honorable Herman W. Coolidge, former United States Bankruptcy Judge for this court, on February 4, 1987 denied relief from the stay and ordered Mr. Austin to pay all delinquent taxes on the property and to make monthly payments of \$500.00 to Fleetwood Insurance.

On December 15, 1988, Fleetwood Insurance again filed a motion for relief from stay. I entered a consent order March 1, 1989 which resolved this motion and which was also signed by Mr.

Austin, his attorney Tyus Butler, Jr., United States Trustee Staff Attorney Jack Usher, and J. Michael Hall, attorney for Fleetwood Insurance. Under the terms of this consent order, the amount due Fleetwood Insurance from Mr. Austin was established at \$66,870.12, with a subsequent \$14.38 per diem interest charge. The order required that (1) Mr. Austin pay all city and county ad valorem taxes due on the property within ninety days of the order, and (2) Mr. Austin pay all accrued interest on the note (\$16,870.12) plus per diem interest subsequent to February 13, 1989 within ninety days of the order. The Consent Order provided that unless Mr. Austin satisfied these two requirements within 90 days of the date of entry of the order or satisfied the entire obligation to Fleetwood Insurance, plus all accrued interest, within one year of entry of the order, the stay would be deemed automatically lifted so as to permit Fleetwood Insurance to proceed with foreclosure against the property. The Consent Order further provides that it is "final and conclusive to the party's [sic] rights in said property and is to be a determination on the merits of the instant contested matter."

Mr. Austin failed to comply with the terms of the Consent Order, at which time Fleetwood Insurance initiated foreclosure on Mr. Austin's interest in the Tybee Island property. Fleetwood Insurance gave notice of the foreclosure to Mr. Austin and the property was advertised for sale in the Savannah Morning News for four consecutive weeks as state law requires. Sale of the property

was scheduled for November 6, 1990. Mr. Austin then filed an adversary proceeding in this court styled Donald E. Austin v. Fleetwood Insurance Agency, Inc. Adversary Proceeding No. 90-04186, in an attempt to enjoin the foreclosure. I held a hearing November 6, 1990 to determine the propriety of the foreclosure and decided after hearing all the evidence and argument that no basis existed for setting aside the Consent Order or enjoining the foreclosure. The property was sold later that day to the highest bidder, Fleetwood Insurance, for the sum of \$54,424.56. Mr. Austin did not attend the sale. A deed under power of sale evidencing the transfer was filed for record in the Office of the Clerk of the Superior Court of Chatham County, Georgia, on November 26, 1990 in Deed Book 147-U, Page 495.

On November 5, 1992, Mr. Austin filed a complaint in the Superior Court of Chatham County, Georgia, against Fleetwood Insurance, William C. Fleetwood, Jr. and Michael A. Fleetwood, individually and as representatives of the estate of William C. Fleetwood, Sr., Thomas S. Gray, Jr., William P. Franklin, Jr., Patricia C. Tanzer (now Paul), James P. Gerard, J. Michael Hall, and the law firm of Oliver Maner & Gray, alleging that the defendants engaged in fraudulent activity relative to their obtaining relief from the automatic stay in his bankruptcy case, ultimately resulting in wrongful foreclosure. The Superior Court defendants then filed two adversary proceedings in this court seeking to enjoin Mr.

Austin's state court proceedings against them. On January 6, 1993, I issued an order denying the injunctive relief requested, finding that under the Anti-Injunction Act, 22 U.S.C. §2283, I should not interfere with the state court resolution of the issues presented.

Subsequently, the Honorable Perry Brannen, Jr., Superior Court Judge of the Eastern Judicial Circuit, State of Georgia, granted the motions of defendants William P. Franklin, Jr., Thomas S. Gray, Jr., Patricia C. Tanzer, James P. Gerard, J. Michael Hall, and the law firm of Oliver Maner & Gray for summary judgment, holding that the issues presented were identical to those presented to and decided by this court in 1990. Judge Brannen stated on page 10 of that decision that Mr. Austin,

"clearly waived any issue as to the fair market value and any and all other defenses existing at the time he entered in the Consent Order. . . . By entering the Consent Order, Mr. Austin waived his defenses to the foreclosure based upon fair market value and the terms of the debt."

Judge Brannen further found that Mr. Austin's "complaints about the fairness and propriety of the foreclosure . . . were or could have been presented to the bankruptcy court at the hearing on injunctive relief," finding those issues could not then be relitigated before him.

Fleetwood Insurance maintains that the Fleetwood defendants' motion for summary judgment remained pending while

appellate review of the summary judgment granted to the other defendants was sought. During this time, Mr. Austin amended and then dismissed the Superior Court complaint only to then institute this adversary proceeding. Fleetwood Insurance claims that since the recordation of the deed under power of sale, it has faithfully maintained its one-half interest in, and concomitant obligations on, the Tybee Island property together with co-owner Steve Andris. Fleetwood Insurance claims that it shares responsibility for ad valorem taxes and all other assessments affecting the property with Mr. Andris. Nothing has been submitted to this court by Mr. Andris which would support or refute this allegation.

Mr. Austin seeks damages for the stay violation which allegedly occurred when Fleetwood Insurance foreclosed on the Tybee Island property, and also requests a declaratory judgment of the ownership rights in the property. This complaint was filed in an attempt to raise, under disguise of new legal theory, the exact same cause of action presented to this court at the hearing held on Mr. Austin's request for injunctive relief November 6, 1990, and then again raised in the Superior Court of Chatham County before Judge Brannen. The instant adversary proceeding is simply another attempt to undo the effects of the Consent Order into which Mr. Austin voluntarily entered. Summary judgment should be granted to Fleetwood Insurance on the claimed stay violation. I find also that the requested declaratory relief is foreclosed by the doctrine of

res judicata.

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Federal Rule of Civil Procedure (FRCP) 56, made applicable by Federal Rule of Bankruptcy Procedure (FRBP) 7056. The party moving for summary judgment bears the initial burden of showing there is no genuine issue of material fact. Velten v. Regis B. Lippert, Intercat, Inc., 985 F.2d 1515, 1523 (11th Cir. 1993). See also Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "To prevail on a motion for summary judgment, [the movant] must prove there is no dispute as to any material fact and that based on the material facts, to which the parties are in agreement, [the movant] is entitled to judgment as a matter of law. Haile v. Reynolds Tobacco Co., et al. (In re Haile), Ch. 11 case No. 88-40864 Adv. 90-4118 at 5 (Bankr. S.D. Ga. Dalis, J. Sept. 27, 1991).

In responding to a motion for summary judgment, the party opposing the motion "may not rest upon the mere allegations or denials of the [opposing] party's pleading, but the [opposing] party's response . . . must set forth specific facts showing that there is a genuine issue for trial." FRCP 56(e). See also, Celotex v. Catrett, supra. The evidence is reviewed in the light most

favorable to the opponent of the motion, and all reasonable doubts and inferences should be resolved in favor of the opponent. Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502 (11th Cir. 1985) (citation omitted), cert. denied 475 U.S. 1107, 106 S.Ct. 1513, 89 L.Ed.2d 912 (1986). Any reservations the court has concerning the evidence will preclude summary judgment. See International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257 (5th Cir. 1991).

Under the explicit terms of the Consent Order, entered March 1, 1989,

. . . in the event the Debtor [Austin] fails to:

(a) satisfy the payment of the Ad Valorem taxes and the payment of accrued interest all on or before the expiration date of Ninety (90) days from the date hereof and/or (b) satisfy the total remaining debt plus all accrued interest within one year from the date hereof, **the Automatic Stay imposed in this action shall be deemed automatically lifted and modified so as to permit Movant [Fleetwood Insurance] to proceed with the foreclosure** of its Deed to Secure Debt and any other action to obtain Fee Simple Title to [the Tybee Island property]. . . (Bold emphasis added)

Under that order, the stay was automatically lifted as to Fleetwood Insurance to pursue foreclosure upon Mr. Austin's failure to comply with the terms of the order. Moreover, Mr. Austin consented well in advance to the lifting of the stay as to Fleetwood Insurance in the event of his failure to pay. The lifting of the stay as to

Fleetwood Insurance and any question of propriety of that stay relief is res judicata under the March 1, 1989 Consent Order.

The plaintiff has attempted to create the illusion of a material issue of disputed fact in a document entitled "Statement of Genuine Issues of Material Fact," filed in response to the defendant's motion for summary judgment. In this document he argues,

Donald Austin submits that a material issue of fact remains . . . as to whether the failure of the advertisement to reflect the actual interest to be conveyed chilled the bidding at the foreclosure sale and whether the deed under power from said sale is invalid as it purports to convey the entire fee in excess of Donald Austin's one-half interest and is thereby voidable under Georgia law.

Plaintiff's attempt to characterize this case as presenting disputed issues of material fact regarding the foreclosure sale is insufficient to alter the nature of this case as one for violation of the automatic stay. There is no dispute that Fleetwood Insurance obtained relief from the stay in order to foreclose on the Tybee Island property, hence there can be no question that an action for stay violation for doing that which stay relief was sought -- foreclosing on the collateral real estate -- may not be maintained as a matter of law. The established material fact of stay relief granted to Fleetwood Insurance demands judgment in favor of Fleetwood Insurance as to the alleged stay violation.

Under the complaint, plaintiff also requests a declaratory judgment resolving the ownership rights as to the Tybee Island property, claiming that the defendant's actions in undertaking an allegedly defective and void foreclosure have resulted in a cloud on the title to the property which a declaratory judgment would dissolve. Because the issues presented by the request for declaratory judgment rest upon the alleged defectiveness of the foreclosure notice, an issue available to Mr. Austin at the hearing held November 6, 1990 before me and addressed by Judge Brannen in his order granting summary judgment in the Superior Court action, I find that these issues are barred from relitigation now by the doctrine of res judicata and that summary judgment is appropriate.

Res judicata relieves parties of the cost and vexation of multiple lawsuits, conserves judicial resources, and by preventing inconsistent decisions encourages reliance on adjudication. Allen v. McCurry, 449 U.S. 90, 95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980). Res judicata prevents litigation of any grounds for or defenses to recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding. Brown v. Felsen, 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767 (1979), citing Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 378, 60 S.Ct. 317, 320, 84 L.Ed. 329 (1940). Res judicata refers to the preclusive effect of a judgment in foreclosing relitigation of matters that were litigated

or could have been litigated in an earlier lawsuit. S.E.L. Maduro (Florida), Inc. v. M/V Antonio de Gastaneta, 833 F.2d 1477, 1481 (11th Cir. 1987). For res judicata to be applied, four essential elements must be present:

- (1) the first action must result in a final judgment on the merits;
- (2) the decision must be rendered by a court of competent jurisdiction;
- (3) the parties to both actions, or those in privity with the parties, must be identical; and
- (4) the causes of action in both suits must be identical.

Id. The principal test for determining whether the causes of action are the same is whether the primary right and duty or wrong are the same in each case. Ray v. Tennessee Valley Authority, 677 F.2d 818, 821 (11th Cir. 1982).

I find that all four elements are present in this case, and that the same cause of action is involved here as was involved in the 1990 adversary proceeding initiated to enjoin the foreclosure. In the case now before me, the plaintiff seeks declaratory relief on the exact same cause of action raised in the 1990 adversary proceeding filed in an attempt to enjoin foreclosure: the propriety of the foreclosure. Mr. Austin claims that the bidding at the foreclosure was chilled because the notices of foreclosure, he alleges, were defective. This issue was ripe at the injunction hearing, and not only could have but should have been

raised at that time. This declaratory relief action is simply a request for relief on a basis which should have been pursued in the first proceeding. Austin alleges that this issue was not available at the time of the hearing for injunctive relief because the bidding had not yet taken place at that time. This argument fails because it ignores the basis of the claim, that the bidding was chilled due to the alleged defectiveness of the foreclosure advertisements, an issue which was ripe at the time of the November 6, 1990 hearing. Because the basis for declaratory relief, i.e., the allegedly defective foreclosure notices, could have and should have been requested at the November 6, 1990 hearing which solely concerned the propriety of foreclosure, I am compelled to find that the present action is precluded by my earlier judgment denying injunction of the foreclosure, and consequently that summary judgment is appropriate. As stated by Judge Brannen in granting summary judgment in the Superior Court case, Mr. Austin's "complaints about the fairness and propriety of the foreclosure . . . were or could have been presented to the bankruptcy court at the hearing on injunctive relief."

This action is simply another attempt by Donald Austin to get out of the deal he made and I approved in the Consent Order entered March 1, 1989. He has repeatedly attempted to use this court as well as the Superior Court of Chatham County as vehicles to avoid the consequences of his self-imposed court-ordered obligations. Mr. Austin must face the consequences of the deal he

made, the loss of his interest in the Tybee Island property. Mr. Austin's repeated and groundless actions constitute an abuse of the judicial process which will not continue.

IT IS THEREFORE ORDERED that the defendant's motion for summary judgment is GRANTED.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 26th day of June, 1995.